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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 64-65-Civil-MC

SAMUEL C. ALPERT, a single man, HAROLD A. MILLER and GRACE B. MILLER, his wife, and EUGENE S. McDONOUGH and LILLIAN McDONOUGH, his wife, Petitioners,

Appellants,

vs.

STEWART L. UDALL, individually and as Secretary of the Interior of the United States of America,

Appellee.

JURISDICTIONAL STATEMENT OF APPELLANTS

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TABLE OF CONTENTS

	Page
THE CASE	1
JURISDICTION	2
THE QUESTIONS	4
THE FACTS	6
FIRST CONTENTION OF SUBSTANTIAL CONSTITUTIONAL INVALIDITY: The United States may not include private lands within a National Park because the inclusion, without more, directly and detrimentally affects the use and user.	17
SECOND CONTENTION OF SUBSTANTIAL CONSTITUTIONAL INVALIDITY: Lack of Constitutional power to limit the uses of lands (short of nuisance, etc.) held in private ownership in National Parks.	23
THIRD CONTENTION OF SUBSTANTIAL CONSTITUTIONAL INVALIDITY: Abuse of the power of Eminent Domain.	25
CONCLUSION	26
APPENDIX I Copy of Opinion and Judgment of Three-Judge Court	App. 1
APPENDIX II The Statute Involved: Public Law 85-428, 72 Stat. 280.	App. 12
CERTIFICATE OF SERVICE	

TABLE OF CASES

Page

Curtin v. Benson, 22 U.S. 78, 32 S.Ct. 31, 56 I Ed. 102 23

Flemming, Secretary of Health, Education & Welfare v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, ___L.E.2d___ (1960) 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 614-62-Civil-EC

SAMUEL C. HALPERT, a single man, HAROLD A. MILLER and GRACE B. MILLER, his wife, and EUGENE B. McDONOUGH and LILLIAN McDONOUGH, his wife, Plaintiffs,

Appellants,

vs.

STEWART L. UDALL, individually and as Secretary of the Interior of the United States of America,

Appellee.

JURISDICTIONAL STATEMENT OF APPELLANTS

JURISDICTIONAL STATEMENT

A

THE CASE

This appeal is by the Plaintiffs from a decision of a Three Judge District Court (convened under 28 USC Section 2282) denying (after hearing and trial) injunc-

tion against the Defendant Secretary of the Interior of the United States restraining the enforcement, operation and execution of the Everglades National Park Act.

The opinion of the Three Judge District Court is not yet reported. A copy is appended as Appendix I.

B

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC Section 1253 providing direct appeal to the Supreme Court from an order granting or denying (in this case denying) after notice and hearing an injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three judges.

The instant case originated when the Plaintiffs, three land owners whose lands had been included without their consent in the Everglades National Park by virtue of an Act of Congress of July 2, 1958 (Public Law 85-482, 72 Stat. 280) brought suit against the Defendant Secretary of the Interior of the United States of America in the United States District Court in and for the Southern District of Florida, Miami Division, to quiet the Plaintiffs' title and to obtain injunctive relief against the enforcement, operation and execution of the said Act of Congress (applying in their Complaint for a Three Judge Court under 28 USC Sections 2282 and 2284).

The date of the Judgment sought to be reviewed is July 10, 1964. (See Appendix I, consisting of the Judgment and opinion of the Three Judge District Court.)

Notice of Appeal was filed August 5, 1964 in the District Court, Southern District of Florida.

The statute of the United States involved in this case is Public Law 85-482, enacted July 2, 1958, 72 Stat. 280-286, which is now Sections 410i through 410p of 16 USC.

The statutory provision is lengthy and is therefore set out in full as Appendix II but the essential sections of the statute are as follows:

> 1. By the Act of Congress the exterior boundaries of the then existing Everglades National Park were extended, within which new extension were the above lands of the Plaintiffs so that the same thereupon became encompassed within the area known as the Everglades National Park.
>
> 2. By virtue of Section 2 of the said Act, now being Section 410j of 16 U.S.C., an authorization was given to the Defendant Secretary of the Interior reading as follows, so far as is pertinent to the litigation herein:
>
> > "The authority of the Secretary of the Interior to acquire land and water for Everglades National Park shall on and after July 2, 1958 be restricted to the area within the boundary described in section 410i of this title. Notwithstanding the proviso contained in section 410 of this title, or any other provision of law, the said Secretary is authorized on and after July 2, 1958, within the boundary fixed

in sections 410i—410p of this title and with any funds made available for that purpose, to acquire land, water, and interests therein by purchase or otherwise subject to the proviso that no parcel within the following described area shall be acquired without the consent of its owner so long as it is used exclusively for agricultural purposes, including housing directly incident thereto, or is lying fallow or remains in its natural state: [There then follows a description of the specific lands which includes and encompasses the lands of the Plaintiffs herein.]"

The jurisdiction of the Supreme Court in this case, vested in it by direct appeal, should need no statement of cases to sustain the jurisdiction. We cite, however, **Flemming, Secretary of Health, Education & Welfare v. Nestor**, 363 U.S. 603, 80 S. Ct. 1367, ___ L.Ed. 2d ___ (1960).

The Federal Constitutional Questions involved in this case are substantial and of great public interest and consequence, as reference to the Statement of the Questions shows, so that argument or discussion on this point would be painting the lily.

C

THE QUESTIONS

The questions presented by this appeal are, as stated in the Notice of Appeal, the following:

IS AN ACT OF CONGRESS VALID (UNDER THE DUE PROCESS AND PRIVATE PROPERTY CLAUSES OF THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION) WHICH PLACES PRIVATE PROPERTY, WITHOUT THE CONSENT OF THE OWNER, WITHIN AND ENTIRELY SURROUNDED BY A NATIONAL PARK AND WHICH AUTHORIZES BUT NOT REQUIRES THE SECRETARY OF THE INTERIOR TO CONDEMN THE LAND ONCE IT IS USED FOR ANY PURPOSE OTHER THAN AGRICULTURAL (OR INCLUDING HOUSING DIRECTLY INCIDENT THERETO OR IS LYING FALLOW OR REMAINS IN ITS NATURAL STATE)?

Subsumed under that question are the following:

(1) Is it a valid exercise of Congressional power to include within a National Park privately owned land without the consent of the owner?

(2) Is is a valid exercise of Congressional power to include within a National Park privately owned land without the consent of the owner when the inevitable effect of such inclusion is (a) to subject the landowner to the regulations of the National Park Service and (b) to control of egress and ingress with identification and checkpoint of entrance required by that Service and (c) to destruction by that Service of the landowner's rights as a property owner abutting a public highway leading to tidewater?

(3) Can exercise of the power of eminent domain for public park purposes be validly conditioned on whether or not a landowner included without his consent in a National Park devotes his land to agricultural purposes, including housing directly incident thereto?

(4) Can exercise of the power of eminent domain for public park purposes be valid when made optional?

(5) If the answer to the aforegoing is yes, then are the restrictions of use exclusively for agricultural purposes, including housing directly incident thereto, or lying fallow or remaining in its natural state, sufficiently unambiguous, nonarbitrary and nondiscriminatory as to constitute valid legislation?

D

THE FACTS

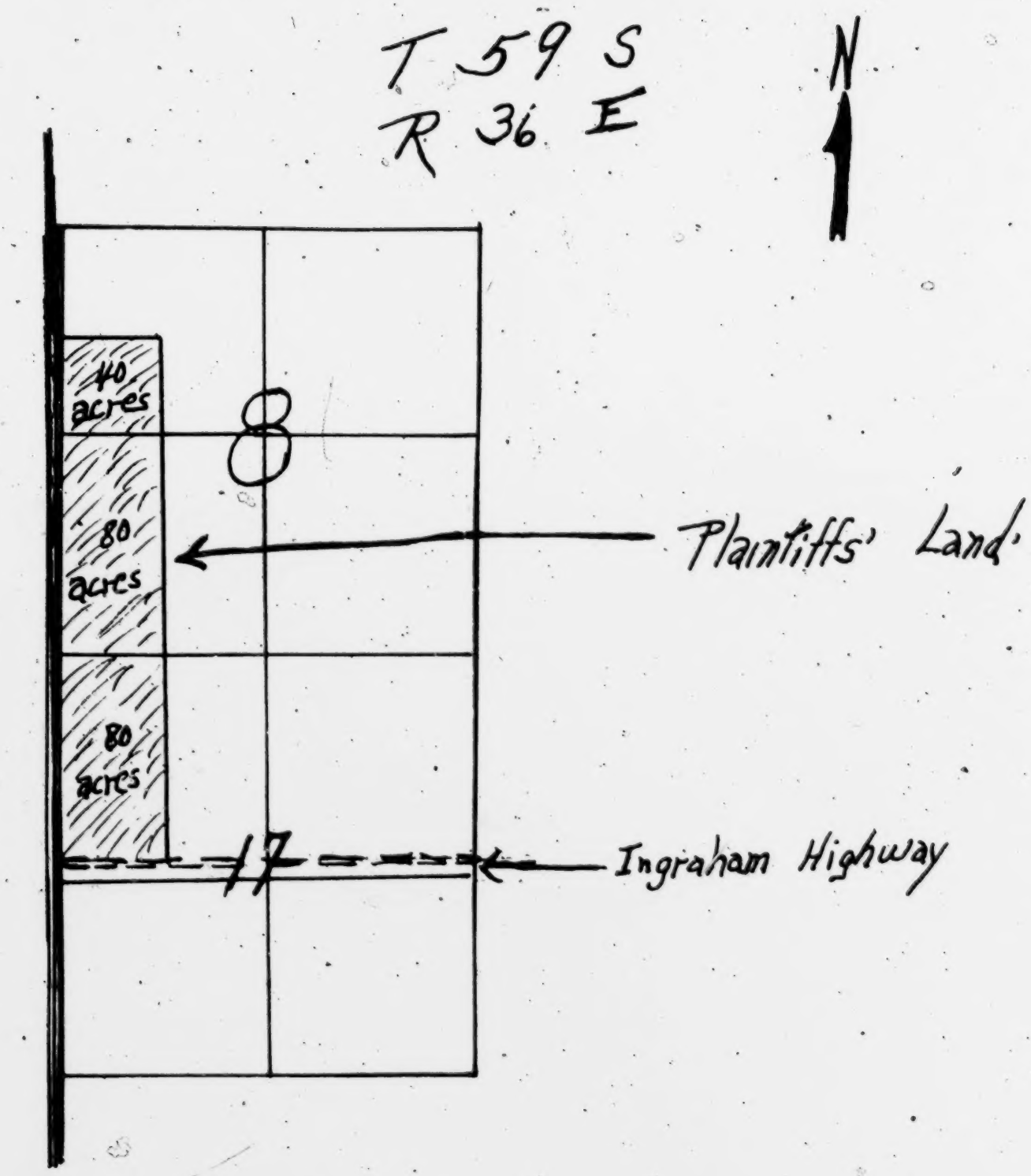
A concise statement of the case containing the facts material to the consideration of the questions presented is as follows:

For a number of years prior to July 2, 1958 the Plaintiffs owned two hundred acres of land the legal description of which is:

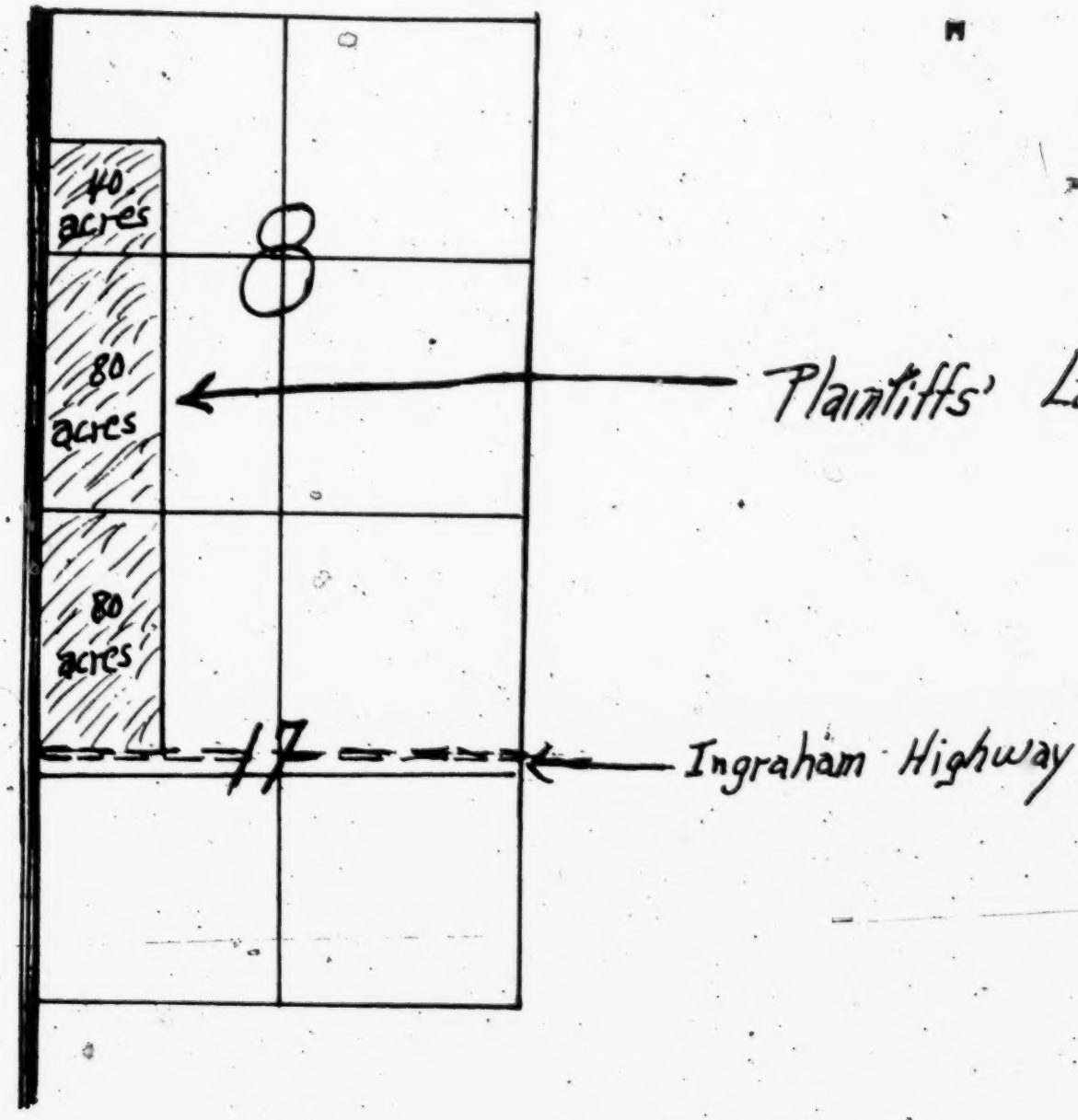
The West Half of the Southwest Quarter and the Southwest Quarter of the Northwest Quarter both in Section 8, Township 59 South, Range 36 East, and

The West Half of the Northwest Quarter of Section 17, Township 59 South, Range 36 East, Both lying in Dade County, Florida, and consisting of 200 acres of land more or less.

These two hundred acres abutted on the west the then eastern boundary line of the then Everglades National Park and abutted on the south a public highway, known as the Ingraham Highway which had been declared a public highway by Act of the Florida Legislature in 1931, for which see Plaintiffs' Exhibit 9. A sketch of the Plaintiffs' land showing the then boundary of the Park and the Highway is the following:

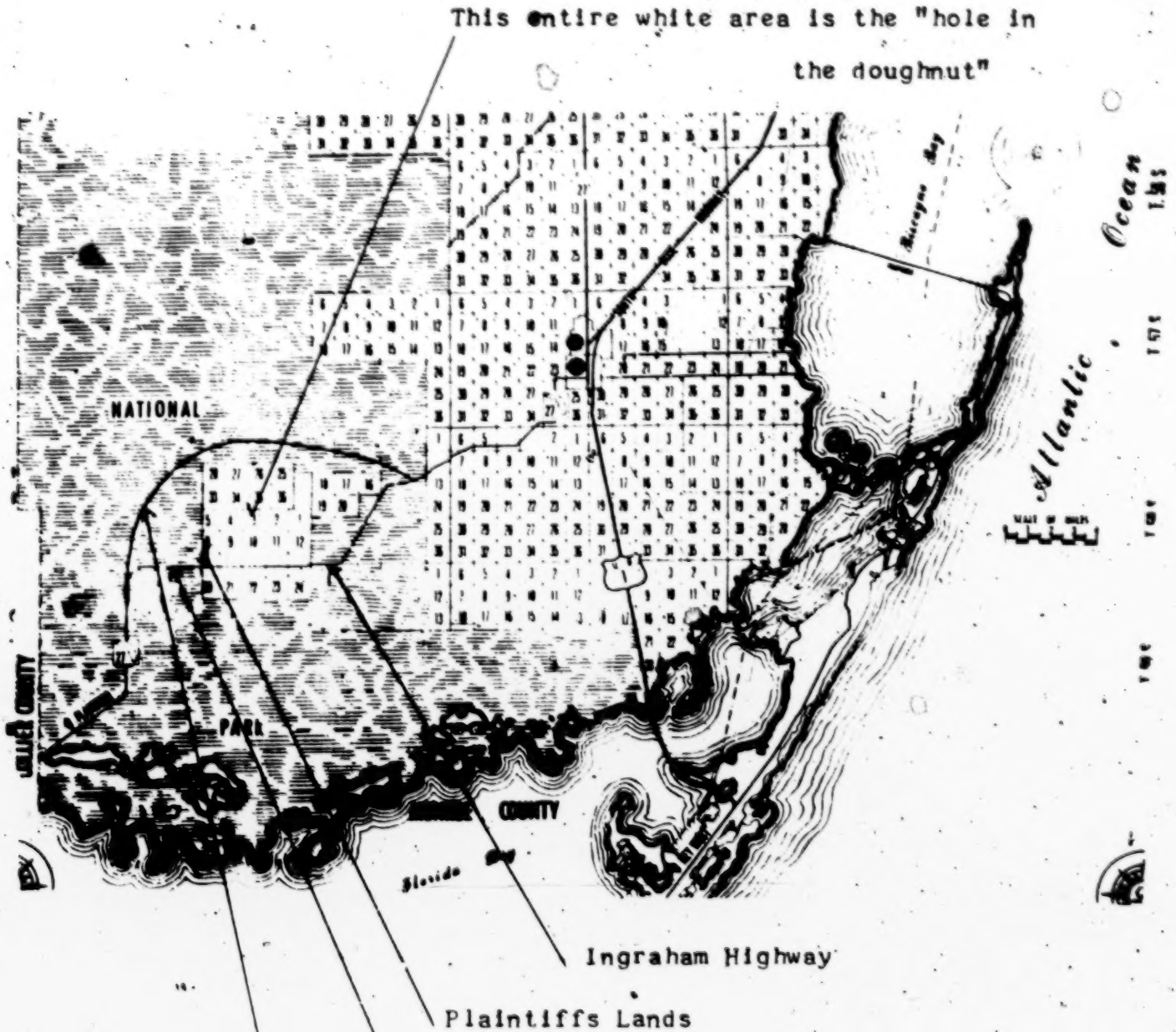

T 59 S
R 36 E
N
40 acres
8
80 acres
Plaintiffs' Land
80 acres
17
Ingraham Highway

Print



Prior Boundary Line of Everglades National Park

Sketch showing the situation after the Act of 1958 and the obliteration of the Highway



Ingraham Highway

Plaintiffs Lands

Ingraham Highway obliterated. See photo of same in Plaintiffs Exhibit 8

The new road built by the Defendant

Prior to the Act of 1958 the Ingraham Highway had been the only route to Cape Sable, to a fishing village named Flamingo and to tidewater (see Plaintiffs' Exhibits 2, 3, 4) and where the Plaintiffs were formerly landowners abutting a public highway the Plaintiffs now found their road obliterated beyond their land. The word "obliterated", it is important to note, was used by the Defendant in this case and not by the Plaintiffs — contrary to the opinion of the Three Judge District Court in this case which is in error on that point — because in the Answer of the Defendant to Interrogatories propounded by it with respect to the Ingraham Highway the Defendant said:

> "1. In response to Interrogatory No. 1, Defendant states that [a] portion of Ingraham Highway on Federal land was obliterated for 3-¼ miles in January 1958 from the east line of Section 18, Township 59 South, Range 36 East to approximate Northwest corner of Section 23, Township 59 South, Range 35 East at intersection with new park road nearing completion."
>
> "2. In response to Interrogatory No. 2, Defendant states that the park road from the entrance to Flamingo was started in May 1955 and completed August 1958."

The Plaintiffs also found that Defendant constructed a new road entirely skirting their property.

The Plaintiffs further found that whereas before the Act of July 2, 1958 they had free and unrestricted access and egress to and from their land via the public

There had been various Everglades National Park Acts enacted at different times, throughout all of which Plaintiffs' lands had remained outside the Park; but by the Act of July 2, 1958 the lands of the Plaintiffs were for the first time and without any by your leave or permission or consent included within the boundaries of the Everglades National Park and not only included within the boundaries but in addition expressly made subject to this clause in the Act of July 2, 1958: " . . . that no parcel within the following described area [in which area Plaintiffs' lands fall — the area being dubbed in local circles the "hole in the doughnut" area — for which see sketch on next page] shall be acquired without the consent of its owner so long as it is used exclusively for agricultural purposes, including housing directly incident thereto, or is lying fallow or remains in its natural state."

highway now they had to pass through a National Park Service checkpoint — a Checkpoint Charley to which we will shortly advert.

It was the position of the Plaintiffs that the Act of July 2, 1958 was unconstitutional and void because:

(a) Lands owned by and belonging to the Plaintiffs was placed without their consent within a National Park operated by Defendant.

(b) Lands owned by and belonging to the Plaintiffs were placed without their consent within a National Park operated by Defendant but without any obligation on the part of Defendant to acquire the land in any case.

(c) Lands owned by and belonging to Plaintiffs were placed without their consent within a National Park operated by Defendant who was empowered to require the lands of the Plaintiffs to be used exclusively for agricultural purposes (including housing directly incident thereto) (or to keep the land lying fallow or in its natural state) on threat of exercising the power of eminent domain should the Plaintiffs devote their lands to any other purpose.

(d) The power of eminent domain is abused to an unconstitutional extent when the matter of public use and necessity — that is park use and necessity — is made to depend upon whether the owner devotes his land to agricultural or to non-agricultural use.

(e) The nature, extent and operation of the Act of July 2, 1958 is to do by indefiniteness, indirection and surreptitiously what cannot lawfully be done directly: that is, appropriate or attempt to appropriate lands without just compensation.

(f) The Act of July 2, 1958 is unconstitutional and void for vesting in the Defendant arbitrary and uncontrolled discretion.

(g) The Act of July 2, 1958 is unconstitutional for indefiniteness of operation.

To these contentions the Three Judge District Court below by a two to one decision held:

"There is no constitutional prohibition which prevents land in private ownership from being within the outer boundaries of a national park. The regulations of the National Park Service recognize the rights of owners of private lands within the limits of national parks to the use and enjoyment of such lands. 36 C.F.R. Sec. 1.32."

It is our position, however, that there is a constitutional prohibition preventing land in private ownership from being placed within the boundaries of a national park.

First Contention of Substantial Constitutional Invalidity: The U. S. May not Include Private Lands Within a National Park Because the In-

clusion, without more, Directly and Detrimentally Affects the Use and User.

We contend, in the first place, that the United States may not include private land within a national park by simply hauling off and passing a piece of legislation so declaring. We candidly confess there is no authority to support this position because apparently this position has never before been asserted in connection with any of the National Parks; but there is no precedent for anything, however, until it is done for the first time. The lack of precedent therefore should simply bid us to be wary but not daunted. On the basic of logic and common sense we submit that our position is sound that the United States may not validly include private land within a national park without the consent of the owner. The effect of the inclusion of private land within a national park is, without more, to cloud the use of the land. When egress and ingress is then controlled by the Government, as it may be under the regulations of the National Park Service and as it in fact is in the case at bar by a Checkpoint Charley (to which we will shortly come), then it cannot be said that the inclusion of private land within a national park has not affected an essential attribute of private ownership, namely unrestricted right to do whatever the owner may want to do, short of nuisance and things of that nature.

The fact of control by Defendant, regardless of ownership and of supposed non-regulation, is shown in the twelve photographs forming Plaintiffs' Composite Exhibit *1*. When the Ingraham Highway was obliterated, a new road was built which completely skirted Plaintiffs' property and all the land in the hole in the doughnut. To

get into the Everglades National Park, as shown by the twelve photographs forming Plaintiffs' Composite Exhibit 7, one must pass through a Ranger Station Checkpoint. In photograph #4, which is a close-up of the Ranger Station Checkpoint, there is a ranger at the station. (Note, by the way, Superintendent Hamilton's direct testimony in the record that the rangers don't inquire " . . . where the regular visitors are going . . . " Who are the **regular** visitors? Note also Superintendent Hamilton's speaking of private land owners in other National Parks being "allowed to go through [the Park to their land] at no charge". Since when is a man "allowed" to go to his own land on a public highway at the sufferance of another?)

The Three Judge Court below conceded the existence of Checkpoint Charley — we proved it to the hilt — but said this:

> "There is no violation of any right of the plaintiffs in the maintenance of a checkpoint. • • • " (page 9 of opinion)

Since when does an American citizen, owning land abutting a public highway, have to seek permission to use the public highway to reach his land and have to submit to an identification check because the Government has decided to surround his land with a park?

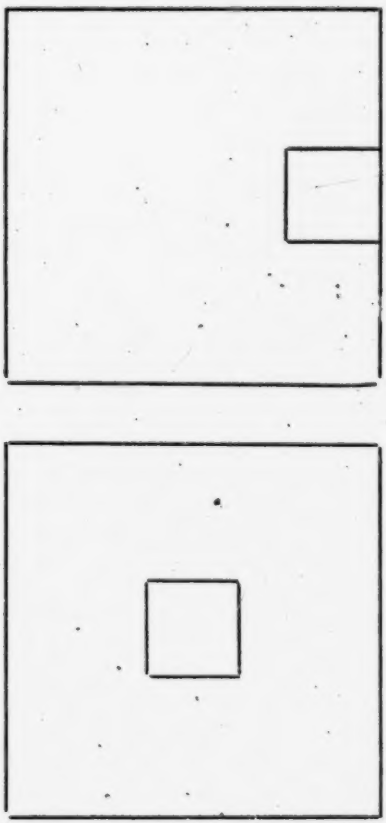
But even beyond that, how can it be asserted that the rights of the owner of the land have not been affected when that requirement is imposed?

In this same connection Regulation 1.41 in Title 36 of the Code of Federal Regulations reads as follows:

> "(a) Automobiles, trucks and other vehicles shall enter or leave parks and monuments only at regular designated entrances and exits, and between such hours as shall be determined by the Superintendent and indicated by official signs posted for that purpose.
>
> "(b) All vehicles shall come to a full stop at entrance and exit stations."

For the Three Judge District Court to say in this case that the Plaintiffs' land had not been affected because Regulation 1.32 states that none of the regulations shall affect private land is to swallow the camel but balk at the gnat. Such a pious statement can only be the expression of a fancy and not of a reality with respect to any lands which form an enclave within a national park. We point out the differences that exist between land

that is not an enclave and land that is an enclave by the two diagrams below.



With the entrance and exit regulations of 1.41 it is apparent that another regulation stating that private lands shall not be affected can have no actuality. Similarly it is obvious that the regulations concerning fishing, the protection of wild life, hunting, and the prohibition of fire arms can have no effect unless persons are stopped at the Park entrance and interrogated. To

say that the regulations have no effect on private land is to speak of ham and eggs without the ham.

Again on Regulation 1.31, it reads in a later pertinent section that no person, firm or corporation shall construct a telephone line, telegraph line, power line or other private or public utility over, through, or under any federally owned land within any park except " . . . where authority therefor has been granted pursuant to irrevocable permit issued by an authorized officer or employee of the National Park Service." Thus the installation of a telephone line, a telegraph line, an electricity line, water, gas, sewage or any other utility is made dependent upon a "revocable permit" issued by an authorized officer of the National Park Service. How can such lines be brought to the enclaved private land except over Park land? How can it be stated that the inclusion within the Park lands of private land as an enclave has not affected the private land? The opinion of the specially concurring Judge in the Three Judge Court below differed sharply with the majority of the Court on this point.

District Judge Choate said this:

> "In the post reconstruction era of 19th Century Texas English capital together with tough, able American cowmen built fabulous land empires in Northwest Texas. State-owned land sold for $.50 per acre, and for that price these frontier entrepeneurs bought and received title to the section lying on the outside perimeter of a block of land. Then through the law of trespass they enjoyed the exclusive use of those

lands contained within this perimeter. A cattleman could obtain the exclusive use of 100,000 acres of land for about $19,000.00 by such strategic purchases. Finally, the pressures of an increasing population and an aroused populace brought an end to such practise.

"It appears, however, that the Congress of the United States, collectively, has taken a page from the biography of that doughty cattleman, Col. Goodnight. Certainly, Public Law 85-482, Act of Congress of July 2, 1958 (16 U.S.C. § 401j) is nothing more than an application of the land dealing that made fortunes for the late 19th century investor in Texas ranches and cattle."

Second Contention of Substantial Constitutional Invalidity: Lack of Constitutional Power to Limit the Uses of Lands (short of nuisance, etc.) Held in Private Ownership in National Parks.

In the case at bar we contend in the second place that we can also rest our position on the lack of power of the Secretary of the Interior to limit the uses to which lands in national parks, held in private ownership, may be put. This position was established as long ago as 1911 in this Court by the case of **Curtin v. Benson**, 222 U.S. 78, 32 S.Ct. 31, 56 L.Ed. 102.

In that case Curtin owned certain lands within the Yosemite National Park and claimed the right to drive his cattle over the toll roads within the Park and to graze them on his land despite a regulation of the Secretary of the Interior forbidding such to be done without the writ-

ten permission of and under the supervision of the Superintendent of the Yosemite National Park. A complaint brought by Curtin to enjoin the Superintendent (Benson) and others from interfering with Curtin's rights was dismissed. (Note that the inclusion of private land within a public park was not raised.) This Court in an opinion by Justice McKenna reversed.

The essence of the opinion as it relates to the case at bar is this:

> "On the merits of the case we may concede, arguendo, as contended by the appellees and disputed by appellant, that the United States may exer e over the Park not only rights of a proprietor, but the powers of a sovereign. There are limitations, however, upon both. Neither can be exercised to destroy essential uses of private property. The right of appellant to pasture his cattle upon his land, and the right of access to it, are of the very essence of his proprietorship. May conditions be put upon their exercise such as appellees put upon them? In answering the question we shall assume, for the time being, that Benson has interpreted correctly the regulations of the Secretary of the Interior. His (Benson's) order is not, it will be observed, a regulation of the use of the land, as an order to fence the land might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use, but the prevention of a legal and essential use—an attribute of ownership—one which goes to make up its essence and value. To take it away is practically to take his property away; and to

do that is beyond the power even of sovereignty, except by proper proceedings to that end.

In the case at bar moreover an additional step was taken which so far as we have been able to ascertain is also without precedent. That additional step is the provision in the Act of July 2, 1958 authorizing but not requiring the Secretary of the Interior to condemn or purchase the Plaintiffs' lands if the Plaintiffs do anything with the land other than devoting it to agriculture (including housing directly incident thereto, etc.).

We have examined the Acts of Congress dealing with Yellowstone National Park and find no such provision, nor is there any such provision in the Acts dealing with any other National Park such as Sequoia, Yosemite, Kings Canyon, Mount Rainier, Petrified Forest, Big Bend, Glacier National, Rocky Mountain National, Grand Canyon National, and others.

For the Three Judge District Court to say as it does that: "The Acts of Congress have not made the Plaintiffs' land a part of the Everglades National Park" is a poor joke to play upon people whose lands have been included within the area of the Everglades National Park by explicit Congressional Act and who are required to make explanations to all and sundry that their land is not really within the Park, even though their land is shown to be within the Park on diagrams and on plats (see Plaintiffs' Exhibits 2, 3, 4, 5, 6).

Third Contention of Substantial Constitutional Invalidity: Abuse of the Power of Eminent Domain.

We contend in the third place that the instant legislation is an abuse of the power of eminent domain. Park use and Park necessity cannot be made to depend upon whether the owner devotes his lands to agricultural or to non-agricultural use. And that gives away the entire purpose behind the instant legislation.

Certainly if this land of the Plaintiffs were needed for a building or other use in the Park, the land would be acquired quickly enough, either by purchase or by condemnation; but when in fact the land is not needed, when it would simply be desirable to have the land appear to be a part of a National Park and use it in connection therewith without actually acquiring it, then this type of legislation is the answer. Such an answer, we submit, is insupportable under our law. Public necessity must be necessity, not if necessity, and not conditional necessity. Or to make this point not quite so broad, we suggest that there can be no valid conditional necessity when the condition is agricultural (or farm housing) use in connection with a National Park because the condition obviously then becomes one unrelated to necessity. In addition, and as the clincher, there cannot be valid conditional necessity when the effect of the occurrence of the condition is optional rather than mandatory. "Optional necessity" is about as ridiculous a phrase as "inclusion within a national park without infringement of right".

CONCLUSION

It is therefore submitted that the questions involved in this case are so substantial as to require plenary consideration with briefs on the merits and oral argument for the resolution.

This Jurisdictional Statement has simply touched the high spots without explicating them.

For example (and this is established by Plaintiffs' Exhibit 2) the Defendant's own publications, particularly U. S. Government Publication "Everglades National Park", Government Printing Office Document No. 1962-0-627745, shows that there is no Ingraham Highway within the Everglades National Park and no privately owned land within the Park. "You say you own land within the Everglades National Park? Come on now, quit kidding. Show me where it is on this Government publication!"

So on the face of the Defendant's own publication the Plaintiffs don't even own any land within the Everglades National Park. That may be scoffed off as a trivial sort of infringement and invasion of rights—though we doubt any land owner would so regard it—and though we doubt any such deliberate invasion is or can be trivial. What cannot be scoffed off is the fatal pathology of which that invasion is but a symptom.

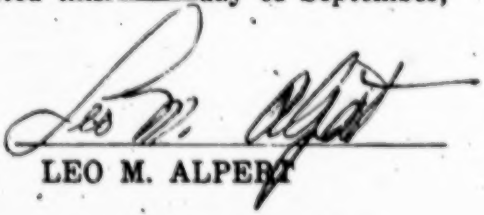
The pathology presented by this case is that Congress decided to create a National Park for the benefit of 180 million Americans and their descendants at the expense of or by burdening several private individuals. Congress may have thought it was conferring a boon on the private individuals—by allowing them limited use of their lands—but such thinking demonstrates the vice of legislation for individuals rather than on principle. Congress apparently thought to combine both legislation for individuals with legislation for the public and produced a scrambled egg.

It is our submission that there is no way to unscram-

ble a scrambled egg and that the Act of July 2, 1958 should and must be declared unconstitutional and that the operation, execution and enforcement of this Act must be restrained.

We repeat again that this jurisdictional statement has touched the high points without explicating them.

Respectfully submitted this 30 day of September, 1964.



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APPENDIX I

COPY OF OPINION AND JUDGMENT OF THREE JUDGE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 614-62-Civ-EC

SAMUEL C. HALPERT, a single man, HAROLD A. MILLER and GRACE B. MILLER, his wife, and EUGENE B. McDONOUGH and LILLIAN McDONOUGH, his wife,

Plaintiffs,

vs

STEWART L. UDALL, individually and as Secretary of the Interior of the United States of America,

Defendant.

Before JONES, Circuit Judge, DYER, Chief Judge, and CHOATE, District Judge.

JONES, Circuit Judge:

The plaintiffs are the owners of a two-hundred-acre tract of land in Dade County, Florida, which they acquired in 1956.

In 1929 the Congress authorized the Secretary of the Interior to investigate the desirability and practicability of establishing a national park in the Everglades of Florida. 45 Stat. 1948. In the same year the Florida Legislature created an Everglades National Park Commission

to acquire title to lands and transfer land to the United States for a park in the Everglades. Power was given to the United States to acquire such lands and "to pass such laws and make or provide for the making of such rules or regulations of both civil and criminal nature, and to provide punishment therefor as in its judgment may be necessary for the management, control, and protection of such lands as may be acquired by the United States under the provisions of this Act." Laws of Florida, Acts of 1929, Ch. 13887. On several occasions the Florida Legislature amended and supplemented[1] the 1929 Act. In 1961, the Florida Legislature, by a statute reciting that the Florida Commission had accomplished its purpose, repealed all of the then operative legisaltion.[2]

In the 1934 Act exclusive jurisdiction, with exceptions not here pertinent, was ceded to the United States over all territory deeded or conveyed to the United States. Ch. 16996, supra, § 4, amending Ch. 13887, supra § 12. The 1947 statute made the provisions applicable not only to lands conveyed to the United States by the Florida Commission, but also to "all lands acquired for national park purposes within the present and future boundaries of the Everglades National Park by the United States of America through and by purchase, grant, condemnation, donation or any other lawful means." Ch. 23910, supra. Thus it appears that the Florida Legislature had not ceded jurisdiction and sovereignty over any lands which had not been acquired by the United States.

---

[1]Laws of Florida, Acts of 1935, Chapters 16995, 16996, 16997; Laws of Florida, Acts of 1941, Ch. 20669; Laws of Florida, Acts of 1943, Ch. 21665; Laws of Florida, Acts of 1945, Chapters 22776, 23109; Laws of Florida, Acts of 1947, Ch. 23910.

[2]Laws of Florida, Acts of 1961, Ch. 61-601.

In 1934, the Congress authorized the establishment of Everglades National Park where title to all the lands within the area recommended by the Secretary of the Interior had been vested in the United States, with a proviso that no land for the park should be accepted "until exclusive jurisdiction over the entire park area, in form satisfactory to the Secretary of the Interior, shall have been ceded by the State of Florida to the United States." 16 U.S.C.A. § 410, 410 a. The park was established and was dedicated by President Truman in 1947. Dovell, Florida 850-851. Another federal statute was passed in 1958. It changed the park boundaries. Some lands formerly within the park were excluded. Some lands not previously in the park were included. It was provided that property within the revised boundary should continue to be administered as Everglades National Park, but property not in federal ownership "shall be administered as a part of the park only after being acquired" as provided by the Act. 16 U.S.C.A. § 410 i. Authorization was given to the Secretary of the Interior to acquire lands held in private ownership within the park boundaries and an appropriation of $2,000,000 was made for that purpose. 16 U.S.C.A. §§ 410 i, 410 p. The authorization for the acquisition was restricted by a proviso that no parcel within a specifically described area "shall be acquired without the consent of its owner so long as it is used exclusively for agricultural purposes, including housing, directly incident thereto, or is lying fallow or remains in its natural state." 16 U.S.C.A. § 410 j. The lands of the plaintiffs are within the area covered by the proviso.

The plaintiffs bring this action against Stewart L. Udall, individually and as Secretary of the Interior, and by their complaint invoke jurisdiction under 28 U.S.C.A.

§ 1331, stating that the matter in controversy exceeds a value of $10,000 and arises under the Constitution and laws of the United States. Diversity jurisdiction is also claimed under 28 U.S.C.A. § 1332. The complaint alleges that by the federal statutes plaintiffs' lands are "within the boundary and area" of the park with title remaining in the plaintiffs, that the Secretary is authorized but not required to purchase plaintiffs' land, and that the Secretary can acquire the land only with plaintiffs' consent unless they improve it for a non-agricultural use in which event the Secretary may acquire it by eminent domain. This, say the plaintiffs, has resulted in a deprivation of their property without due process of law in violation of the Fifth Amendment. By their prayer the plaintiffs seek a decree quieting their title free from any restriction arising under the statute, a declaration that the Act of Congress of 1958 be declared unconstitutional as an encumbrance against plaintiffs' land, and restraining the Secretary from taking the position that plaintiffs' lands are within the park and can be used only for agricultural purposes under pain of eminent domain if otherwise used.

By an amendment to their complaint the plaintiffs assert that the defendant closed a public highway which had been in use for over thirty years and had abutted the plaintiffs' lands. It was said that persons using the road were required to pass a control and identification point established by the defendant. The road, say the plaintiffs, is in a state of disrepair and hazardous to use. The prayer of the amendment seeks the removal of the barrier on the highway and the elimination of the checkpoint. The plaintiffs ask that the defendant be required to maintain the highway in a reasonably safe condition for travel by the public. Although by their pleading the plaintiffs ask

that the Secretary be required to maintain the highway, their brief asserts that they do not request maintenance of the highway and that the question as to who has the duty to maintain is not an issue. The brief, which is not, of course, a pleading and does not serve the purpose of a pleading, says that a mandatory injunction should issue requiring the Secretary to restore the highway to the condition it was in immediately prior to its "obliteration." We are uninformed as to what is meant by obliteration. The word was used by plaintiffs' counsel in cross-examining a former Superintendent of the park, who repeated the word. In view of the testimony of this witness that the highway now is in about the same condition as it was in 1958, we assume that the erection of the barricade is what is meant by obliteration. The three-judge court was constituted before the amendment to the complaint was filed.

We first consider the highway question. The evidence, which was rather inconclusive, showed that the highway, known as Ingraham Highway, was a Florida State Highway. It extended from Miami, on the Atlantic Coast, to Cape Sable, on the Gulf Coast, traversing lands which now comprise the southerly part of the park. It is presently open and maintained by the State to the plaintiffs' lands and runs along their south boundary. The portion of the highway which plaintiffs want the Secretary to restore runs through lands within the park owned by the United States over which the State has ceded jurisdiction. The State has conveyed to the United States all the land owned by it within the park boundaries. The portion of the highway which has been closed is wholly within the park. The State of Florida might contend that it did not convey title or cede jurisdiction of the highway to

the United States. Cf. Colorado v. Toll, 268 U.S. 228, 45 S.Ct. 505, 69 L.Ed. 927. But it has made no such contention. It maintains that part of the road running from Miami or its environs, to the park boundary. It has not attempted to maintain any of the remainder of the former roadway. If Ingraham Highway, as it traverses the park, is a State Highway, such claim, if any, the plaintiffs may have for the maintenance and use, or restoration is against the State. We have no opinion as to whether the plaintiffs could successfully assert any such claim against the State, or whether the State could reopen and maintain the closed portion of the highway. These questions are not before us. We do hold that the plaintiffs have no right to require the Secretary defendant to restore and open the road.

A property owner cannot challenge the closing of a road where the injury to him is not materially different than that sustained by the public. Hebb v. Bartow, 142 Fla. 78, 194 So. 312. This is particularly true where there is another means of ingress and egress even though the other route is substantially longer. Winn v. United States, 9th Cir. 1959, 272 F. 2d 282; Henry L. Daugherty & Co. v. Joachim, 146 Fla. 50, 200 So. 238. See also Florida State Turnpike Authority v. Anhoco Corporation, Fla. 107 So. 2d 51. The plaintiffs are entitled to no relief against the Secretary of the Interior by reason of the closing of that portion of Ingraham Highway entirely within the Park.

There is no constitutional prohibition which prevents land in private ownership from being within the outer boundaries of a national park. The regulations of the National Park Service recognize the rights of owners of private lands within the limits of national parks to the

use and enjoyment of such lands. 36 C. F. R § 1.32. The extent to which the United States may exercise jurisdiction over such privately owned land will depend upon whether there has been a cession of jurisdiction by the State to the United States, and if so, the extent of the cession. Peterson v. United States, 9th Cir. 1951, 191 F. 2d 154, cert. den. sub nom State of California v. United States, 342 U. S. 855, 72 S. Ct. 174, 96 L. Ed. 664. The statutes herein cited show that the State ceded jurisdiction only over lands acquired by the United States. The Federal Government is prohibited from administering privately owned lands as a part of the park. The Acts of Congress have not made the plaintiffs' land a part of Everglades National Park.

It cannot be questioned but that the United States may acquire lands for national park purposes and may do so by an exercise of the power of eminent domain. In the granting of the power by Congress to the head of a governmental department there may be restrictions or limitations on the power. The Congress might, had it chosen to do so, have provided that the "hole in the doughnut" area should not, under any circumstances, be acquired as a part of the park. Had it done so, such a provision could have been changed by subsequent legislation. The plaintiffs are not prevented, by the 1958 Act of Congress, from devoting their land to any lawful use. If the land is used by the plaintiffs otherwise than for agriculture the restriction against its acquisition by the Government would terminate, but no obligation on the part of the United States to acquire the property would arise. If the proviso containing the restriction had been omitted from the statute, the Secretary would have been authorized but would not have been required to acquire the plain-

tiffs' land. We cannot see how a valid grant of authority to acquire property for a public use becomes invalid and in violation of the due process clause when there is a restriction or condition annexed to the grant of authority.

There is no violation of any right of the plaintiffs in the maintenance of a checkpoint. This is within the police power of the United States and within the powers ceded to it by the State of Florida over park lands owned by the United States. No undue hardship or burden is cast upon the plaintiffs. If those who are charged with the administration of the Park should interfere with the full use by the plaintiffs of their property, such wrongs may be redressed.

It is the view of the majority of the Court that the statutory provision under attack is not unconstitutional as depriving the plaintiffs of property without due process of law or upon any other basis. The views of Judge Choate are set forth in his concurring opinion.

This opinion shall constitute the findings of fact and conclusions of law of the Court.

Judgment will be entered for the defendant.

Dated this 10 day of July, 1964.

WARREN L. JONES
United States Circuit Judge

DAVID W. DYER
United States District Judge

CHOATE, District Judge:

I concur with the able opinion of Judge Jones except in the premise that an inclusion in a Federal Park would be in nowise a taking, or that a conditional authority to the Secretary to so acquire imposes no burden upon the lands in question. See, **c.f., Alford v. Finch,** 155 So.2d 790 (Fla. 1963).

In the post reconstruction era of 19th Century Texas English capital together with tough, able American cowmen built fabulous land empires in Northwest Texas. State-owned land sold for $.50 per acre, and for that price these frontier entrepreneurs bought and received title to the section lying on the outside perimeter of a block of land. Then through the law of trespass they enjoyed the exclusive use of those lands contained within this perimeter. A cattleman could obtain the exclusive use of 100,000 acres of land for about $19,000.00 by such strategic purchases. Finally, the pressures of an increasing population and an aroused populace brought an end to such practise.

It appears, however, that the Congress of the United States, collectively, has taken a page from the biography of that doughty cattleman, Col. Goodnight. Certainly, Public Law 85-482, Act of Congress of July 2, 1958 (16 U.S.C. § 401j) is nothing more than an application of the land dealing that made fortunes for the late 19th century investor in Texas ranches and cattle.

Judge Jones finds nothing actionable in this legislation. I agree that his position has the force of considerable logic. Thus, his major premise is that Congress may at any time authorize the condemnation of any land. Followed by his minor premise that in the case at hand the

right of condemnation has been restricted rather than enlarged, the conclusion that the Congress has taken nothing from the plaintiff is inescapable. However, rigid logic can sometimes produce sophistry rather than truth, and this I conclude is the result here. That portion of the Act which begins

> "subject to the proviso that no parcel within the following described area shall be acquired without the consent of its owner so long as . . . "

is a red flag to any title lawyer, purchaser, developer, or investor. I did not need the testimony of John A. Kotte, Esq. to recognze the fact that the Congress has by the language of its legislation impaired the title of the subject lands. The owners of equally improbable south Florida land have reaped large rewards by imaginative development in the fifty year history of the area's expansion. This Act of Congress has substantially impaired plaintiffs' ability to develop or promote these lands. Thus, I conclude that there has been a partial taking. It is one thing to have the sword of condemnation resting available but unpointed in the governmental sheath. It is another to have it suspended like that of Damocles directly above one's property.

I concur in the result herein, because I find no justification for the relief sought by the plaintiffs. Although, in my opinion, the Act would violate the plaintiffs' rights under the Fifth Amendment, if they are not compensated for a partial taking; plaintiffs have a remedy by which to seek compensation provided by statute. There is no reason, therefore, to reach the constitutional question as I would remit the plaintiffs to the Court of Claims or to an action under the Tucker Act.

EMETT C. CHOATE

JUDGMENT

The Court having had a final hearing in this cause and heard argument of counsel, it is

ORDERED, ADJUDGED and DECREED That judgment is hereby entered for the defendant with costs taxed to the plaintiffs.

DONE and ORDERED this 10 day of July, 1964.

WARREN L. JONES
United States Circuit Judge

DAVID W. DYER
United States District Judge

EMETT C. CHOATE
United States District Judge

APPENDIX II

THE STATUTE INVOLVED

Public Law 85-482 72 Stat. 280

AN ACT

To fix the boundary of Everglades National Park, Florida, to authorize the Secretary of the Interior to acquire land therein, and to provide for the transfer of certain land not included within said boundary, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding section 1 of the Act of May 30, 1934 (48 Stat. 816, 16 U. S. C., sec 410), or any action taken pursuant to authority contained therein, the exterior boundary of Everglades National Park, Florida, is subject to the provisions of section 7 of this Act, hereby fixed to include the following described lands:

(1) Beginning at the intersection of the south right-of-way line of United States Highway Numbered 41, also known as the Tamiami Trail, and the west line of township 54 south, range 37 east, as shown on the Everglades National Park base map numbered NP-EVE-7109, revised August 10, 1949;

thence southerly along the west line of township 54 south, range 37 east, along the west line of Government lot 6 lying between township 54 south, and township 55 south, range 37 east, and along the west line of township 55 south, range 37 east, and township 56 south, range 37

east and along the west lines of sections 6, 7, and 18, township 57 south, range 37 east, to the southwest corner of section 18, said township and range;

thence easterly along the north line of sections 19, 20, 21, 22, and 23 of said township and range to the northeast corner of section 23;

thence southerly along the east line of sections 23, 26, and 35 of said township and range to the southeast corner of said section 35;

thence easterly along the south line of section 36, of said township and range, to the southeast corner of said section 36;

thence southerly along the east line of sections 1, 12, 13, 24, 25, and 36, township 58 south, range 37 east, and along the west line of sections 6, 7, and 18, township 59 south, range 38 east, to the northwest corner of section 19, said township and range;

thence easterly along the north line of sections 19, 20, 21, 22, 23, and 24 of township 59 south, range 38 east, and sections 19 and 20 of township 59 south, range 39 east, to the southwest right-of-way line of United States Highway Numbered 1;

thence southeasterly along the southwest right-of-way line of United States Highway Numbered 1 to a point which is the northerly point of a tract of land conveyed by the trustees of the internal improvement fund, State of Florida, to John E. Ravlin, and others, by deed dated November 5, 1943, recorded in deed book G16, page 72, in Monroe County public records;

thence following along the westerly and southerly boundary of said tract to its point of intersection with a

line parallel with and 200 feet northwesterly from the centerline of Intracoastal Waterway near the southern point of said Ravlin tract;

thence southwesterly, following a line parallel to the centerline of said Intracoastal Waterway and 200 feet northwesterly from said centerline to a point due north of Long Key Light, approximately longitude 80 degrees 50 minutes west, latitude 24 degrees 51 minutes north;

thence northwesterly, following a line at all times parallel to the centerline of said Intracoastal Waterway and 200 feet northeasterly from said centerline to a point opposite the Oxford Bank Light, approximately longitude 81 degrees 00 minutes 40 seconds west, latitude 24 degrees 59 minutes 10 seconds north;

thence northwesterly in a straight line to a point 3 miles due south of the most southernmost point of East Cape (Cape Sable);

thence due north in a straight line to a point 2 miles due south of the most southernmost point of East Cape (Cape Sable);

thence northwesterly in the Gulf of Mexico in a straight line to a point 2 miles due west of the southeast corner of fractional section 31 (Middle Cape), township 60 south, range 32 east;

thence northwesterly in a straight line to a point 2 miles due west of the most westernmost point of Northwest Cape (Cape Sable);

thence northeasterly in a straight line to a point 2 miles due west of the northwest corner of fractional section 6, township 59 south, range 32 east;

thence northwesterly in a straight line to a point 2 miles due west of the southwest corner of section 6, township 58 south, range 32 east;

thence northwesterly in a straight line to a point 2 miles due west of the northwest corner of fractional section 28, township 56 south, range 31 east;

thence northwesterly in a straight line to a point 3 miles due west of the southwest corner of fractional section 32, township 54 south, range 30 east;

thence northwesterly in a straight line to the southwest corner of section 28, township 53 south, range 28 east;

thence northerly along the west line of section 28, township 53 south, range 28 east, to the northwest corner of said section 28;

thence easterly along the north line of section 28, township 53 south, range 28 east, to the northeast corner of said section 28;

thence northerly along the west line of section 22, township 53 south, range 28 east, to the northwest corner of said section 22;

thence easterly along the north line of section 22, township 53 south, range 28 east, to the northeast corner of said section 22;

thence northerly along the west line of section 14, township 53 south, range 28 east, to the northwest corner of said section 14;

thence easterly along the north line of section 14, township 53 south, range 28 east, to the northeast corner of said section 14;

thence northerly along the west line of section 12, township 53 south, range 28 east, to the northwest corner of said section 12;

thence easterly along the north line of section 12, township 53 south, range 28 east, to the northeast corner of said section 12;

thence northerly along the west line of section 6, township 53 south, range 29 east, to the northwest corner of said section 6;

thence easterly along the north line of township 53 south, range 29 east, to the northeast corner of section 4, township 53 south, range 29 east;

thence southerly along the east lines of sections 4, 9, 16, and 21, township 53 south, range 29 east, to the southeast corner of the northeast quarter of said section 21;

thence easterly to the center of section 22, township 53 south, range 29 east;

thence southerly to the southeast corner of the southwest quarter of section 22, township 53 south, range 29 east;

thence easterly along the south line of section 22, township 53 south, range 29 east, to the southeast corner of said section 22;

thence southerly along the west line of section 26, township 53 south, range 29 east, to the southwest corner of the northwest quarter of said section 26;

thence easterly to the center of section 26, township 53 south, range 29 east;

thence southerly to the northwest corner of the south-

west quarter of the southeast quarter of section 26, township 53 south, range 29 east;

thence easterly to the northeast corner of the southeast quarter of the southeast quarter of section 26, township 53 south, range 29 east;

thence southerly along the east line of section 26, township 53 south, range 29 east, to the southeast corner of said section 26;

thence easterly along the north line of section 36, township 53 south, range 29 east, to the northeast corner of the northwest quarter of said section 36;

thence southerly to the southwest corner of the northwest quarter of the southeast quarter of section 36, township 53 south, range 29 east;

thence easterly to the southeast corner of the northeast quarter of the southeast quarter of section 36, township 53 south, range 29 east;

thence continuing easterly to the southeast corner of the northwest quarter of the southwest quarter of section 31, township 53 south, range 30 east;

thence northerly to the northeast corner of the northwest quarter of the northwest quarter of section 31, township 53 south, range 30 east;

thence continuing northerly to the northeast corner of the southwest quarter of the southwest quarter of section 30, township 53 south, range 30 east;

thence westerly to the northeast corner of the southeast quarter of the southeast quarter of section 25, township 53 south, range 29 east;

thence northerly along the east lines of sections 25, 24, and 13, township 53 south, range 29 east, to the northeast corner of said section 13; thence easterly along the north lines of sections 18, 17, 16, 15, 14, and 13, to the northeast corner of section 13, township 53 south, range 30 east;

thence southerly along the east lines of sections 13, 24, 25, and 36 to the southeast corner section 36, township 53 south, range 30 east;

thence easterly along the north lines of sections 6, 5, and 4 to the northeast corner of section 4, township 54 south, range 31 east;

thence southerly along the east line of section 4 to the southeast corner of section 4, township 54 south, range 31 east;

thence easterly along the north line of section 10 to the northeast corner of section 10, township 54 south, range 31 east;

thence southerly along the east line of section 10 to the southeast corner of section 10, township 54 south, range 31 east;

thence easterly along the north line of section 14 to the northeast corner of section 14, township 54 south, range 31 east;

thence southerly along the east line of section 14 to the southeast corner of section 14, township 54 south, range 31 east;

thence easterly along the north line of section 24 to the northeast corner of section 24, township 54 south, range 31 east;

thence southerly along the east lines of sections 24 and 25 to the southeast corner of section 25, township 54 south, range 31 east;

thence easterly along the north lines of sections 31, 32, and 33 to the northeast corner of section 33, township 54 south, range 32 east;

thence southerly along the east line of section 33 to the southeast corner of section 33, township 54 south, range 32 east;

thence easterly along the north line of section 3, to the northeast corner of section 3, township 55 south, range 32 east;

thence southerly along the east lines of sections 3 and 10, to the southeast corner of section 10, township 55 south, range 32 east;

thence easterly along the north line of section 14, to the northeast corner of section 14, township 55 south, range 32 east;

thence southerly along the east line of section 14, to the southeast corner of section 14, township 55 south, range 32 east;

thence easterly along the north line of section 24, to the northeast corner of section 24, township 55 south, range 32 east;

thence southerly along the east lines of sections 24 and 25 to the northeast corner of the southeast quarter of section 25, township 55 south, range 32 east;

thence easterly along the north line of the south half of section 30 to the northeast corner of the south half of section 30, township 55 south, range 33 east;

thence southerly along the east lines of sections 30 and 31 to the southeast corner of section 31, township 55 south, range 33 east;

thence southerly along the east line of section 6, to the southeast corner of section 6, township 56 south, range 33 east;

thence easterly along the north lines of sections 8, 9, 10, 11, and 12, to the northeast corner of section 12, township 56 south, range 33 east;

thence easterly along the north lines of sections 7, 8, 9, 10, 11, and 12, to the northeast corner of section 12, township 56 south, range 34 east;

thence easterly along the north line of section 7 to the northeast corner of section 7, township 56 south, range 35 east;

thence northerly along the west line of section 5 to the northwest corner of section 5, township 56 south, range 35 east;

thence northerly along the west lines of sections 32, 29, 20, 17, 8, and 5 to the northwest corner of section 5, township 55 south, range 35 east;

thence northerly along the west lines of sections 32, 29, and 20 to the intersection of the south right-of-way line of the Loop Road, township 54 south, range 35 east;

thence easterly along the south right-of-way line of the Loop Road and the south right-of-way line of United States Highway Numbered 41, also known as the Tamiami Trail, through sections 20, 21, 22, 23, and 24, township 54 south, range 35 east, to the intersection of the east township line, township 54 south, range 35 east;

thence easterly along the south right-of-way line of United States Highway Numbered 41, also known as the Tamiami Trail, through sections 19, 20, 21, 22, 23, and 24, township 54 south, range 36 east, to the east township line of township 54 south, range 36 east;

thence easterly along the south right-of-way line of United States Highway Numbered 41, also known as the Tamiami Trail, across township 36½ east to the intersection of the west line of township 54 south, range 37 east, the point of beginning;

(2) Land acquired by the United States of America for furthering administration and use of the park by deeds dated January 25, 1954 (2), and February 27, 1954 (2), recorded in the public records of Monroe County, Florida, book OR-3, pages 302 to 308, inclusive, and book OR-2, pages 378 to 381, inclusive, respectively; and accepted by the National Park Service on April 7, 1954 (2), and April 5, 1954 (2), respectively; and

(3) Not to exceed 35 acres, to be acquired by donation only, in or in the vicinity of Everglades City, Florida, which the Secretary of the Interior may find necessary and suitable for furthering administration and use of the park.

Land and water now in Federal ownership within said boundary shall continue to be administered as Everglades National Park; however, the land and water therein not in Federal ownership shall be administered as a part of the park only after being acquired as hereinafter provided.

SEC. 2. The authority of the Secretary of the Interior to acquire land and water for Everglades National

Park shall hereafter be restricted to the area within the boundary described in section 1. Notwithstanding the proviso contained in section 1 of the Act of May 30, 1934 (48 Stat. 816, 16 U. S. C., sec. 410), or any other provision of law, the said Secretary is hereafter authorized, within the boundary fixed in this Act and with any funds made available for that purpose, to acquire land, water, and interests therein by purchase or otherwise subject to the proviso that no parcel within the following described area shall be acquired without the consent of its owner so long as it is used exclusively for agricultural purposes, including housing, directly incident thereto, or is lying fallow or remains in its natural state:

Beginning at the southwest corner of section 31, township 58 south, range 37 east;

thence southerly along the west line of sections 6 and 7, township 59 south, range 37 east, to the southeast corner of section 24, township 59 south, range 36 east;

thence westerly along the south lines of sections 24, 23, 22, 21, and 20, township 59 south, range 36 east, to the southwest corner of said section 20;

thence northerly along the west lines of sections 20, 17, 8, and 5, township 59 south, range 36 east, to the northwest corner of said section 5;

thence to the southwest corner of section 33, township 58 south, range 36 east;

thence northerly along the west lines of sections 33 and 28, township 58 south, range 36 east, to the northwest corner of said section 28;

thence easterly along the north lines of sections 28,

27, 26, and 25, township 58 south, range 36 east, to the northeast corner of said section 25;

thence southerly along the east line of section 25, township 58 south, range 36 east, to the point of intersection of the east line of said section 25 and the north line of section 18, township 58 south, range 37 east, extended westerly along the hiatus;

thence easterly across the hiatus to the northwest corner of section 18, township 58 south, range 37 east;

thence easterly along the north lines of sections 18, 17, and 16, township 58 south, range 37 east, to the northeast corner of said section 16;

thence southerly to the northeast corner of section 21, township 58 south, range 37 east;

thence westerly along the north lines of sections 21 and 20, township 58 south, range 37 east, to the northeast corner of the northwest quarter of said section 20;

thence southerly along the west line of the east half of section 20, township 58 south, range 37 east, to the southeast corner of the southwest quarter of said section 20;

thence westerly along the north lines of sections 29 and 30, township 58 south, range 37 east, to the northwest corner of said section 30;

thence southerly along the west lines of sections 30 and 31, township 58 south, range 37 east, to the southwest corner of said section 31; the point of beginning.

The authority to acquire land, water, and interests therein within the park boundary fixed in section 1 of this Act but outside the area designated in the Act of October 10, 1949 (63 Stat. 733), is further subject to the right of

retention by the owners thereof, including owners of interests in oil, gas, and mineral rights or royalties, and by their heirs, executors, administrators, successors, and assigns, at their election of the following:

(1) The reservation until October 9, 1967, of all oil, gas, and mineral rights or interests, including the right to lease, explore for, produce, store, and remove oil, gas, and other minerals from such lands;

(2) In the event that on or before said date, oil, gas, or other minerals are being produced in commercial quantities anywhere within the boundary fixed in section 1 of this Act but outside the area designated in the Act of October 10, 1949, the time of the reservation provided in subsection (1) above shall automatically extend for all owners within said boundary and outside of said area regardless of whether such production is from land in which such owners have an interest, for so long as oil, gas, or other minerals are produced in commercial quantities anywhere within said boundary and outside of said area. To exercise this reservation, the owners, their lessees, agents, employees, and assigns shall have such right of ingress to and egress from such land and water as may be necessary; and

(3) After the termination of the reserved rights of owners as set forth in subsections (1) and (2) of this section, a further reservation of the right to customary royalties, applying at the time of production, in any oil, gas, or other minerals which may be produced from such land and water at any time before January 1, 1985, should production ever be authorized by the Federal Government or its assigns.

SEC. 3. Unless consented to by an owner retaining the reservation set forth in subsections (1) and (2) of section 2 of this Act, no action shall be taken by the Federal Government during the period of such reservation to purchase, acquire, or otherwise terminate or interfere with any lease or leases which may be applicable to said owner's land.

SEC. 4. Any reservations retained under the provisions of subsections (1) and (2) of section 2 of this Act shall be exercised by the owners subject to reasonable rules and regulations which the Secretary may prescribe for the protection of the park, but which shall permit the reserved rights to be exercised so that the oil, gas, and minerals may be explored for, developed, extracted, and removed from the park area in accordance with sound conservation practices. All operations shall be carried on under such regulations as the Secretary may prescribe to protect the land and area for park purposes.

SEC. 5. In acquiring any of the land or water within the area described in the first section of this Act the Secretary of the Interior shall exercise reasonable diligence to ascertain whether owners elect to retain reservations in accordance with the provisions of section 2 of this Act. If, after the exercise of such reasonable diligence, owners cannot be located, or do not appear in judicial proceedings to acquire the land and water, so that it may be ascertained whether they desire to retain reservations in accordance with the provisions hereof, the Secretary may acquire the fee simple title to their land free and clear of reservations as set forth in subsections (1), (2), and (3) of section 2 of this Act.

SEC. 6. Unless the Secretary, after notice and opportunity for hearing, shall find that the same is seriously detrimental to the preservation and propagation of the flora or fauna of Everglades National Park, he shall permit such drainage through the natural waterways of the park and the construction, operation, and maintenance of artificial works for conducting water thereto as is required for the reclamation by the State of Florida or any political subdivision thereof or any drainage district organized under its laws of lands lying easterly of the eastern boundary of the park in township 54 south, ranges 31 and 32 east, township 55 south, ranges 32 and 33 east, and township 56 south, range 33 east. He shall grant said permission, however, only after a master plan for the drainage of said lands has been approved by the State of Florida and after finding that the approved plan has engineering feasibility and is so designed as to minimize disruptions of the natural state of the park. Any right-of-way granted pursuant to this section shall be revocable upon breach of the conditions upon which it is granted, which conditions shall also be enforcible in any other appropriate manner, and the grantee shall be obligated to remove its improvements and to restore the land occupied by it to its previous condition in the event of such revocation.

SEC. 7. The Secretary of the Interior is authorized to transfer to the State of Florida by quitclaim deed the land, water, and interests therein, previously acquired by the United States of America for Everglades National Park and not included within such park by section 1 of this Act, such transfer to be in exchange for the conveyance by the State of Florida to the United States of all land, water, and interests therein, owned by the State within the boundary of the park as described in section 1

of this Act: *Provided*, That exclusion of any land, water, and interests therein from the park boundary pursuant to section 1 of this Act shall be dependent upon the contemporaneous conveyance by the State to the United States of all land, water, and interests therein, owned by the State within the park boundary described in section 1 of this Act, including land, water, and interests therein, heretofore conveyed to the State for transfer to the United States for inclusion in Everglades National Park. The effectuation of the transfer provided for in this section shall be a condition precedent to the acquisition by the Secretary of any land, water, or interests therein held in private ownership within the boundaries set forth in section 1 of this Act and outside the area designated in the Act of October 10, 1949, except as such acquisition is by donation.

SEC. 8. There are hereby authorized to be appropriated such sums, but not more than $2,000,000 in all, as are required for the acquisition of land, water, and interests therein held in private ownership within the boundaries of Everglades National Park as fixed by section 1 of this Act and outside the area described in the Act of October 10, 1949.

Approved July 2, 1958.

PROOF OF SERVICE

I, LEO M. ALPERT, Attorney for the Plaintiffs-Appellants herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 30 day of September, 1964, I served copies of the within Jurisdictional Statement to the Supreme Court of the United States on the several parties hereto, as follows:

1. On the United States, by leaving a copy thereof at the office of William A. Meadows, Jr., United States Attorney for the Southern District of Florida, Miami Division, at Room 235 in the Federal Building in Miami, and by mailing a copy in a duly addressed envelope with Air Mail postage prepaid to the Solicitor General, Department of Justice. Washington 25, D. C.

2. On the Defendant Secretary of the Interior by mailing a copy in a duly addressed envelope with Air Mail postage prepaid, to Herbert Pittle, Attorney, Department of Justice, Room 2136 Justice Building, Washington, D. C.

Leo M. Alpert

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 552

SAMUEL C. HALPERT, a single man, HAROLD A. MILLER and GRACE B. MILLER, his wife, and EUGENE B. McDONOUGH and LILLIAN McDONOUGH, his wife, APPELLANTS

v.

STEWART L. UDALL, individually and as Secretary of the Interior of the United States of America

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(c) of the Revised Rules of this Court, appellee moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment entered July 10, 1964, by a three-judge court convened in the

United States District Court for the Southern District of Florida, Miami Division, pursuant to 28 U.S.C. 2282.

The appellants are the owners of a 200-acre tract of land in Dade County, Florida, which they acquired in 1956. They brought this action against the appellee, the Secretary of the Interior, to quiet title to their lands free of any restriction imposed by the Act of July 2, 1958, 72 Stat. 280, 16 U.S.C. 410i, *et seq.*, which enlarged the exterior boundaries of the Everglades National Park so as to surround their lands, to enjoin the Secretary from taking any action under the Act and to have the Act declared unconstitutional as an encumbrance against their lands.

Briefly, the history is as follows.

In 1929, the Secretary of the Interior was authorized to investigate the desirability of establishing a national park in the Florida Everglades. Act of March 1, 1929, 45 Stat. 1443. In the same year, the State of Florida created the Everglades National Park Commission and authorized it to acquire lands in the Everglades and to transfer title to such lands to the United States for the park. By the act of May 30, 1934, 48 Stat. 816, 16 U.S.C. 410, Congress authorized the establishment of the Everglades National Park when title to all lands recommended by the Secretary of the Interior had been vested in the United States. By amendatory and supplemental legislation pertaining to the Everglades, the State of Florida in 1935 ceded exclusive jurisdiction over all territory deeded or conveyed to the United States. Laws of

Florida, 1935, Ch. 16996. By 1947, title to lands acquired by the State of Florida in the Everglades had been transferred to the United States and the Everglades National Park was established and dedicated. In that year, the State of Florida made the provisions of its 1935 cession applicable not only to lands conveyed by it to the United States but "to all lands acquired for national park purposes within the present and future boundaries of the Everglades National Park by the United States of America through and by purchase, grant, condemnation, donation or any other lawful means." Laws of Florida, 1947, Ch. 23910.

By the Act of July 2, 1958, 72 Stat. 280, 16 U.S.C. 410i, the exterior boundaries of the park were changed and some lands formerly within the park area were excluded. Some lands not previously in the park were included. The statute provided that property within the revised boundary should continue to be administered as the Everglades National Park, but that property not in federal ownership "shall be administered as a part of the park only after being acquired" as provided by the Act. Section 410j authorized the Secretary of the Interior to acquire lands held in private ownership within the park boundaries, provided that no parcel within a described area, which includes the area in which the appellants' land is located, "shall be acquired without the consent of its owner so long as it is used exclusively for agricultural purposes, including housing, directly incident thereto, or is lying fallow or remains in its natural state."

After the three-judge court was convened, the appellants amended their complaint to assert that the appellee had closed a public highway which had been in use for over 30 years and which abutted the appellants' land. They alleged that persons using the road were required to pass a control and identification point established by the appellee and that the road was permitted to remain in a state of disrepair. The appellants requested additional relief, requiring the Secretary of the Interior to remove the barrier, eliminate the checkpoint, and maintain the abandoned highway in a safe condition.

ARGUMENT

THE JUDGMENT OF DISMISSAL SHOULD BE AFFIRMED BECAUSE THE CASE DOES NOT PRESENT A JUSTICIABLE CONTROVERSY AND DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION.

A. NO JUSTICIABLE CONTROVERSY IS PRESENTED.

A suit against an individual, in this case the Secretary of the Interior, to declare an act of Congress unconstitutional and for injunctive relief, does not present a justiciable controversy nor a substantial constitutional question when the act of Congress does not by its terms deprive appellants of any property and when the appellee has not threatened, does not threaten, and has manifested no intention to interfere with appellants' property. The court below expressly found that neither the Secretary of the Interior, the appellee in this action, nor the United States, has taken any steps to exercise dominion over

appellants' property or to interfere in any way with their personal use and enjoyment.

It seems plain, therefore, that the appellants' action for declaratory judgment and for injunction against the appellee Secretary of the Interior does not present a justiciable controversy.

B. NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS PRESENTED.

Mere enactment of legislation authorizing condemnation of private property is not a "taking" of the property. *Willink* v. *United States*, 240 U.S. 572; *Danforth* v. *United States*, 308 U.S. 271, 286; *United States* v. *Miller*, 317 U.S. 369; *Martin* v. *United States*, 270 F. 2d 65 (C.A. 4); *Beistline* v. *City of San Diego*, 256 F. 2d 421 (C.A. 9), certiorari denied, 358 U.S. 865; *23 Tracts of Land, Etc.* v. *United States*, 177 F. 2d 967 (C.A. 6). And it has been decided that the threat to condemn one's property does not constitute a "taking" of the property. *Hempstead Warehouse Corp.* v. *United States*, 98 F. Supp. 572, 120 C. Cls. 291.

The three-judge court found that the closing of the public highway which abutted appellants' property did not deprive the appellants of any property right. The portion of the highway which appellants requested the court to require the Secretary to restore runs through lands within the park owned by the United States and over which the State has ceded jurisdiction. The State has conveyed to the United States all of the land owned by it within the park boundaries. While the State of Florida might possibly contend that it did not convey title or even cede jurisdiction of the

highway to the United States, cf. *Colorado* v. *Toll*, 268 U.S. 228 (1925), it is not a party here and no such contention has been made.

The court further held that there is no constitutional prohibition against enclosing land in private ownership within the outer boundaries of a national park. See, for example, the factual situation in *Robbins v. United States*, 284 Fed. 39 (C.A. 8); *United States* v. *Peterson*, 91 F. Supp. 209 (S.D. Cal.), affirmed, 191 F. 2d 154 (C.A. 9), certiorari denied *sub nom. California* v. *United States*, 342 U.S. 885 and *Curtin* v. *Benson*, 222 U.S. 78. As the court found, the regulations of the National Park Service recognize the rights of owners of private lands within the limits of national parks to the use and enjoyment of such land. See 36 C.F.R. 1.32.

Even if it were to be decided that the statutory authorization for future condemnation of appellants' land under special circumstances constituted a present partial taking of the property, that conclusion (as Judge Choate pointed out in his concurring opinion) would not support the present action for injunctive and declaratory relief. For, in that event, appellants' remedy would be a suit for just compensation under the Tucker Act, 28 U.S.C. 1346. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682; *Dugan* v. *Rank*, 372 U.S. 609.

We conclude that no substantial constitutional question is presented which justifies plenary consideration here. Accordingly, the judgment below should be

affirmed.[1] *California Water Service Co.* v. *Redding*, 304 U.S. 252.

CONCLUSION

For the foregoing reasons, the judgment should be summarily affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
HERBERT PITTLE,
Attorneys.

OCTOBER 1964.

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[1] It may well be that the constitutional challenge to the Act of July 2, 1958, was so insubstantial as to deprive the statutory court of three judges of jurisdiction (as initially urged by appellee in opposing the application for the three-judge court). In that event, the appropriate disposition here might be to vacate the judgment and remand the case to a single district judge (who, in the absence of other issues, must dismiss the complaint). See *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171. However, in light of the concurrence of the three judges below and the absence of any issue for decision by a single judge, it would seem appropriate to decide no more than that the constitutional question merits no further argument.

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In The
Supreme Court of The United States

October Term, 1964

No. 552

SAMUEL C. HALPERT, a single man, HAROLD A. MILLER and GRACE B. MILLER, his wife, and EUGENE B. McDONOUGH and LILLIAN McDONOUGH, his wife,

Appellants

v.

STEWART L. UDALL, individually and as Secretary of the Interior of the United States of America

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On Appeal from the United States District Court for the Southern District of Florida, Miami Division

---

BRIEF OF APPELLANTS OPPOSING MOTION TO AFFIRM

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In The
Supreme Court of The United States

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BRIEF OF APPELLANTS OPPOSING MOTION TO AFFIRM

I

The United States says there is no justiciable controversy presenting a substantial constitutional question because, so says the United States, the Act of Congress has not interfered in any way with the personal use and enjoyment by the Appellants of their land, nor have any

acts of the Appellee, so says the United States, interfered in any way with the personal use and enjoyment.

That paragraph in the Motion to Affirm is in disregard of the facts.

The Appellants here, American citizens owning land abutting a public highway, have to seek permission of the Appellee to use the public highway to reach their land and have to submit to an identification check by the Appellee because the United States Congress decided to surround their land with a park.

The Court below found that was the fact but said there was no violation of any of the rights of the Appellants in those conditions—we refer to the facts as set forth on pages 18 through 23 of our Jurisdictional Statement—now the Appellee says he doesn't even do what was admittedly done.

II

The United States goes on to say that there was not a "taking" of the property in this case. If "taking" be discussed, there was not a "letting alone" either, but a sneaky piece of legislation under which Congress, emulating the lives of the Texas cattle barons, chose to enclave the land of the Appellants with the result that the Act of Congress attacked here and the acts of the Appellee Secretary of the Interior pursuant thereto are "a red flag to any title lawyer, purchaser, developer or investor" in the language of the specially concurring judge below.

The "taking" cases are therefore of no import here.

III

It is a remarkable contention, and one which runs counter to long established law (*Philadelphia Co. v. Stimson*, 223 U.S. 605, 32 S.Ct. 340 (1912) through *Dugan v. Rank*, 372 U.S. 609, 83 S. Ct. 999 (1963)) as well as to the principles of our institutions, that the Government now urges that the sole remedy for one injured by an unconstitutional act of Congress (and the acts of officers pursuant thereto) is to sue for damages.

We respectfully move that the Court take jurisdiction and set the cause for plenary consideration.

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